12.00 HOMICIDE - DEATH PENALTY - SENTENCING
(18 U.S.C. §§ 3591 et seq.)

Instructions 12.01-.03 are to be given at the beginning of the sentencing phase, before the introduction of evidence. They are intended to be a concise overview, so that the jury has a basic understanding of the decisions it will be called upon to make.

Instructions 12.04 - 12.22 are to be given after all evidence has been presented and prior to deliberations.

Death Penalty - Preliminary Instructions

12.01 INTRODUCTION TO PRELIMINARY INSTRUCTIONS

Members of the jury, you have unanimously found the defendant[1] _____ guilty of the offense of _____ as charged in Count____ [repeat for each offense] of the indictment. You must now consider whether imposition of a sentence of death is justified, or whether the defendant should be sentenced to life imprisonment without the possibility of release[2][, or a lesser sentence] for commission of this [these] crime[s].

This decision is left exclusively to you, the jury. If you determine[3] that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the court is required to impose that sentence.

Before you may consider whether to impose a sentence of death, you must make each of the following three findings unanimously and beyond a reasonable doubt:

[First, you must find unanimously and beyond a reasonable doubt that defendant was at least 18 years of age at the time of the offense[s][4]; and]

[First] [Second], you must find unanimously and beyond a reasonable doubt that defendant

[intentionally killed (name of victim)]

[intentionally inflicted serious bodily injury that resulted in the death of (name of victim)]

[intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and (name of victim) died as a direct result of the act]

[intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and (name of victim) died as a direct result of the act]; and

[Second] [Third], you must find unanimously and beyond a reasonable doubt that the government has proved the existence of at least one statutory aggravating factor. I will define the term "aggravating factors" for you shortly.

Death Penalty - Preliminary Instructions

If, after fair and impartial consideration of all the evidence in this case, any one of you does not make these [two] [three] findings beyond a reasonable doubt, your deliberations will be over. If you do unanimously make these [two] [three] findings beyond a reasonable doubt, you will then proceed to determine whether you unanimously find that the government has proved the existence of any nonstatutory aggravating factors beyond a reasonable doubt, and whether any of you find that the defendant has proved any mitigating factors by a preponderance of the evidence. You must then engage in a weighing process. If you unanimously find that the aggravating factor or factors, which you all found to exist, sufficiently outweigh any mitigating factor or factors, which any one of you[5] found to exist to justify imposition of[6] a sentence of death, or, if, in the absence of a mitigating factor or factors, you find that the aggravating factor or factors alone are sufficient to justify imposition of a sentence of death, and that death is therefore the appropriate sentence in this case, the law provides that the defendant must[7] be sentenced to death.

If, after weighing the aggravating and mitigating factors, any one of you finds that a sentence of death is not justified, the jury must then determine whether the defendant should be sentenced to life imprisonment without possibility of release, or be given a lesser sentence to be determined by the court.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that is entirely yours. [You must not take anything I may say or do during this phase of the trial as indicating [what I think of the evidence or] what I think your verdict should be.]

Two terms that you have already heard and will hear throughout this phase of the case are "aggravating factors" and "mitigating factors." These factors concern the circumstances of the crime or the personal traits, character or background of the defendant [and the effect of the offense on the victim (and the victim's family][8].

[The word "aggravate" means "to make worse or more offensive" or "to intensify." The word "mitigate" means "to make less severe" or "to moderate."][9] An aggravating factor[, then,] is a fact or circumstance which would tend to support imposition of the death penalty. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense(s), or any other

relevant fact or circumstance which might indicate that the defendant should not be sentenced to death.

In the death penalty statute, a number of aggravating factors are listed. These are called "statutory aggravating factors." As I instructed you earlier, before you may consider imposition of the death penalty, you must find that the government proved at least one of these aggravating factors specifically listed in the death penalty statute, and your finding must be unanimous and beyond a reasonable doubt. [In addition to statutory aggravating factors, there may also be aggravating factors not specifically set out in the death penalty statute. Again, your finding that any non statutory aggravating factor exists must be unanimous and beyond a reasonable doubt.]

The defendant has the burden of proving any mitigating factors. However, there is a different standard of proof as to mitigating factors. You need not be convinced beyond a reasonable doubt about the existence of a mitigating factor; you need only be convinced that it is more likely true than not true in order to find that it exists. A unanimous finding is not required. Any one of you may find the existence of a mitigating factor, regardless of the number of other jurors who may agree.

If you have unanimously found that at least one statutory aggravating factor exists, you then must weigh the aggravating factors you have all found to exist against any mitigating factors you have individually found to exist, to determine the appropriate sentence. Any juror may also weigh a mitigating factor found by another juror, even if he or she did not also find that factor to be mitigating.[10] I will give you detailed instructions regarding the weighing of aggravating [and mitigating] factors before you begin your deliberations. However, I instruct you now that you must not simply count the number of aggravating [and mitigating] factors and reach a decision [based on which number is greater]; you must consider the weight and value of each factor.

[The government alleges the following statutory aggravating factors: [list factors] The government also alleges the following nonstatutory aggravating factors: [list factors] The defendant alleges the following mitigating factors: [list factors]][11]

Death Penalty - Preliminary Instructions

Notes on Use

1. These instructions have been prepared in a single-defendant format. Appropriate modifications for proceedings involving multiple defendants would be necessary.

2. In Simmons v. South Carolina, 512 U.S. 154, 156, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that where a defendant's future dangerousness was at issue and the only sentencing alternative to the death penalty under state law was life imprisonment without possibility of parole, due process required that the sentencing jury be informed that the defendant was ineligible for parole. The Court reiterated that holding in Shafer v. South Carolina, 532 U.S. 36, 51, 121 S. Ct. 1263, 1273 (2001).

Sections 3593(e) and 3594, Title 18, United States Code, provide that the jury shall make a recommendation regarding whether the defendant should be sentenced to death or life imprisonment without the possibility of release, which would require that they be informed of this option for offenses under sections 3591(b)(1)-(2). The practice in most states is to inform the sentencing jury of life without parole as an alternative to capital punishment. Simmons v. South Carolina, 512 U.S. at 167-68 nn.7-8, 114 S. Ct. at 2195-96.

3. Although the statute uses the word "recommend," the jury's determination is binding; the court MUST impose the sentence the jury "recommends" unless a new trial is ordered. The Committee recommends use of the word "determine," because of concern that use of the word "recommend" might tend to diminish the jury's sense of its ultimate responsibility for determining the sentence. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

4. Courts have consistently held that where a statute requires that a defendant be of a certain age in order to be guilty of an offense, the defendant's age is an element of the offense and must be proven beyond a reasonable doubt. *See e.g.,* Watson v. State, 140 N.E.2d 109, 110-11 (Ind. 1957); State v. Thompson, 365 N.W.2d 40, 41-42 (Iowa 1985); Barnett v. State, 488 So. 2d 24 (Ala. Crim. App. 1986); State v. Lauritsen, 261 N.W.2d 755, 756 (Neb. 1978); Lee v. State, 481 S.E.2d 264, 265-66 (Ga. App. 1997); State in the Interest of A.N., A Juvenile, 630 A.2d 1183, 1184 (N.J. Super. 1993); State v. Collins, 620 A.2d 1051, 1053 (N.J. Super. 1993). Therefore, the Committee recommends that the issue be submitted to the jury, unless the defendant agrees to stipulate that he/she was at least 18 years of age at the time of the offense.

5. In Jones v. United States, 527 U.S. 373, 377 (1999), the Supreme Court held that the jury may consider a mitigating factor in its weighing process so long as one juror accepts the factor as mitigating by a preponderance of the evidence.

6. The Committee was concerned that absence of the words "imposition of" rendered the decision before the jury too abstract.

7. In United States v. Allen, 247 F.3d 741, 780 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), the Eighth Circuit held that this instruction and Instruction12.11 (the weighing instruction), which the defendant had attacked as impermissibly mandatory in nature, "accurately explain the jury's role in sentencing under the FDPA." The court also held that the district court did not abuse its discretion in refusing to give the defendant's "mercy" instruction, which closely followed the language in the Title 21 statute, to the effect that the jury, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence." It concluded that

> Under the FDPA, the jury exercises complete discretion in its determination of whether the aggravating factors outweigh the mitigating factors. The jury was informed that whether or not the circumstances justify a sentence of death was a decision left entirely to them. Mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances. The FDPA merely precludes the jurors from arbitrarily disregarding its unanimous determination that a sentence of death is justified.

Id. at 781.

8. This phrase should be used with extreme caution. Section 3593(a), Title 18, United States Code, provides that aggravating factors "may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family . . ." Some kinds of "victim impact" evidence are clearly admissible, i.e., evidence which amounts to "circumstances of the crime." See Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). Other "personal traits" of the victim are clearly not to be considered as part of the sentencing determination, i.e., race, color, religion, national origin or gender. See 18 U.S.C. § 3593(f); Zant v. Stephens, 462 U.S. 862, 885 (1983). Some "victim impact" evidence might be mitigating and must be submitted as such under Lockett v. Ohio, 438 U.S. 586, 604-08 (1978).

9. Whether to define the words "aggravate" and "mitigate" is a decision best left to the district court.

10. See Note on Use 1, Instruction 12.09, *infra*.

11. Whether to list the aggravating and mitigating factors for the jury at the preliminary stage of the sentencing phase is a decision for the district court to make depending on the circumstances of the

case before it.

In Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002), the Supreme Court held that statutory aggravating factors must be found by the jury beyond a reasonable doubt. By implication, those factors, as well as the requisite intent state, must also be alleged in the indictment. Id.; United States v. Cotton, 122 S. Ct. 1781 (2002). Further, section 3593(a) requires the government to give notice of aggravating factors prior to trial or plea of guilty. The government is therefore precluded from offering evidence during the penalty phase of additional statutory aggravating factors which were not alleged in the indictment and of nonstatutory aggravating factors for which notice was not given. However, the statute does not require the defendant to disclose mitigating factors. Therefore, the district court should not limit the defendant in presenting evidence of any mitigating factor. Further, although Rule 16 gives the district court broad discretion to regulate discovery, the Committee takes no position on whether the district court can order the defendant to disclose, prior to the penalty phase hearing, the mitigating factors he or she intends to prove.

Committee Comments

As indicated in Note on Use 7 to this instruction, the Eighth Circuit Court of Appeals in United States v. Allen, 247 F.3d 741, 780-81 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), approved the language of this instruction and Instruction 12.11 (the weighing instruction), rejecting defendant's assertion that the instructions were impermissibly mandatory.

Death Penalty - Preliminary Instructions

12.02 BURDEN OF PROOF

This instruction is to be given at the beginning of the sentencing phase, before the introduction of evidence.

As I have just instructed you, the government must meet its burden of proof beyond a reasonable doubt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence[1] received in this trial. It is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendant does not have the burden of disproving the existence of anything the government must prove beyond a reasonable doubt. The burden is wholly upon the government; the law does not require the defendant to produce any evidence at all.

It is the defendant's burden to establish any mitigating factors, by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which of the evidence is more believable. [If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.]

[The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits presented by the government or the defendant.]

[To prove something by the preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable doubt.]

Notes on Use

1. The Supreme Court has emphasized the importance of providing the jury with all relevant and reliable information, Jurek v. Texas, 428 U.S. 262, 276 (1976); Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("it [is] desirable for the jury to have as much information as possible when it makes the sentencing decision"); accord Payne v. Tennessee, 501 U.S. 808, 820-21, 111 S. Ct. 2597, 2606 (1991) (the prosecutor is free to offer "a wide range of

relevant material" in a capital sentencing proceeding). See also 18 U.S.C. § 3661 (use of information for sentencing) ("No limitation shall be placed on the information concerning the background, character, and conduct of [the defendant]."); accord Fed. R. Crim. P. 32(a).

Probably for this reason, section 3593(c) uses the word "information" rather than "evidence." It provides that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Nevertheless, the Committee recommends use of the word "evidence," to avoid the possibility of juror confusion.

The Eighth Circuit has rejected the contention that the "relaxed" evidentiary standards applicable at the penalty phase of the trial violate a capital defendant's constitutional rights. United States v. Allen, 247 F.3d 741, 759-60 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002). For a discussion of some of the issues that have arisen because of the nonapplicability of the Federal Rules of Evidence in capital sentencing proceedings, see United States v. Beckford, 964 F. Supp. 993 (E.D. Va. 1997); United States v. Fell, 2002 WL 31113946 (D. Vt. Sept. 24, 2002) (holding FDPA unconstitutional because imposition of death penalty based on information not subject to constitutional guarantees of evidentiary admissibility.)

Committee Comments

See Eighth Circuit Manual of Model Criminal Jury Instructions, 3.11, 6.21.853; Eighth Circuit Manual of Model Civil Jury Instructions, 3.04.

Death Penalty - Preliminary Instructions

12.03 EVIDENCE [1]

This instruction is to be given at the beginning of the sentencing phase, before the introduction of evidence.

In making all the determinations you are required to make in this phase of the trial, you may consider any evidence that was presented during the guilt phase of the trial as well as evidence that is presented at this sentencing phase of the trial.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it. [In deciding what testimony of any witness to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with other evidence that you believe.]

Notes on Use

1. See Note on Use 1, Instruction 12.02.

Committee Comments

See Eighth Circuit Manual of Model Criminal Jury Instructions, 1.03 - 1.05.

Death Penalty - Final Instructions

12.04 INTRODUCTION TO FINAL INSTRUCTIONS

Regardless of any opinion you may have as to what the law may be - or should be - it would be a violation of your oaths as jurors to base your verdict upon any view of the law other than that given to you in these instructions.

Some of the legal principles that you must apply to this sentencing decision duplicate those you followed in reaching your verdict as to guilt or innocence. Others are different. The instructions I am giving you now are a complete set of instructions on the law applicable to the sentencing decision. I have prepared them to ensure that you are clear in your duties at this extremely serious stage of the case. I have also prepared a special verdict form that you must complete. The form details special findings you must make in this case and will help you perform your duties properly.

Committee Comments

The Committee recommends that the court give each jury member a copy of the instructions and the Special Verdict Form to read and notate.

12.05 FINDING AS TO DEFENDANT'S AGE (18 U.S.C. § 3591) (Homicide)

[Before you may consider the imposition of the death penalty, you must first unanimously agree beyond a reasonable doubt that the defendant was eighteen years of age or older at the time of the offense.

If you unanimously make that finding, you should so indicate on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding, you should so indicate on [the appropriate] page [___] of the Special Verdict Form and follow the directions on page [___] of the form. No further deliberations will be necessary.][1]

Notes on Use

1. See Note on Use 4, Instruction 12.01, *infra*.

Death Penalty - Final Instructions

12.06 FINDING OF REQUISITE MENTAL STATE (18 U.S.C. § 3591) (Homicide)

Before you may consider the imposition of the death penalty, you must [also] unanimously find beyond a reasonable doubt that the defendant intentionally [killed] [committed acts resulting in the death of] (name of victim) in [the] [one of the] manner(s)[1] described below. If you unanimously make that finding [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form, and follow the direction on page [___]. No further deliberations will be necessary [as to that murder].

The government alleges that [LIST SEPARATELY FOR EACH MURDER AS APPROPRIATE]:[2]

[Examples]

1(A). [The defendant] intentionally killed the victim, [name of victim], by [summarize pertinent predicate facts, e.g., shooting her in the head]. To establish that the defendant intentionally killed the victim, the government must prove that the defendant killed the victim with a conscious desire to cause the victim's death.

1(B). [The defendant] intentionally inflicted serious bodily injury that resulted in the death of the victim, [name of victim], by [summarize pertinent predicate facts, e.g., (inflicting a severe blow to the head of) (shooting) (stabbing)] [name of victim], which resulted in the death of (name of victim). The government must prove that the defendant deliberately caused serious injury to the victim's body which in turn caused the victim's death. "Serious bodily injury" means a significant or considerable amount of injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a body member, organ or mental faculty.

1(C). [The defendant] intentionally participated in an act, [contemplating that the life of a person [name of victim] would be taken] [intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim, [name of victim] died as a direct result of the act], by [summarize pertinent predicate facts, e.g., (ordering) (directing) (hiring) (another) (others) to (inflict a severe blow to the head of) (shoot) (stab) [name of victim], which directly resulted in the death of [name of victim]]. The government must prove that the defendant deliberately [describe act(s) committed] with a conscious desire that a person be killed or that lethal force be employed against a person. The phrase "lethal force" means an act [or acts] of violence capable of causing death.

1(D). [The defendant] intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and [name of victim] died as a direct result of the act, by [summarize pertinent predicate facts].

[Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of defendant's knowledge or intent.][3]

[You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.]

Notes on Use

1. If the court instructs on multiple intent states, it must ensure the instructions state clearly that the jury's finding as to a particular mental state be unanimous. See Special Verdict Form, pp. 83-84.

2. Impermissible duplication. In a death penalty case arising under 21 U.S.C. § 848(e), which defines these mental states as aggravating factors, the court in United States v. Tipton, 90 F.3d 861, 899 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997), stated that the purpose for requiring the finding of intent is

> to focus the jury's attention upon the different levels of moral culpability that these specific circumstances might reasonably be thought to represent, thereby channeling jury discretion in the weighing process.

The court went on to note that:

> To allow cumulative findings of these intended alternative circumstances, all of which do involve different forms of criminal intent, runs a clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally.

Id.; accord United States v. McCullah, 87 F.3d 1136, 1137-38 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997); United States v. Beckford, 968 F. Supp. 1080 (E.D. Va. 1997) (jury could consider any mental states supported by the evidence, but could return a finding as to only one of the submitted factors); United States v. Johnson, 1997 WL 534163 (N.D. Ill. Aug. 20, 1997); but see United States v. Flores, 63 F.3d 1342, 1369-72 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996). Although section 3591(a)(2) does not define 1(A) - (D) as statutory aggravating factors which are weighed in determining whether to impose the death penalty, see Instruction 12.11, and therefore the same concerns addressed in Tipton and McCullah are not present, the Committee suggests that, to avoid any concern over "stacking the deck" in favor of the death penalty, the court instruct only on those mental states clearly supported by the evidence.

3. If "intent" is included in other instructions in addition to this one, the Committee recommends that a separate intent instruction be given based upon Instruction 7.05, *infra*.

Committee Comments

The mental states set forth in 18 U.S.C. § 3591(a)(2) concern the defendant's state of mind at the time of perpetrating or participating in the killing. At least one of the following mental states must be found to exist before the death penalty may be considered.

(A) The defendant intentionally killed the victim. See Baldwin v. Alabama, 472 U.S. 372, 385 (1985).

(B) The defendant intentionally inflicted serious bodily injury which resulted in the death of the victim. See Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

(C) The defendant intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim. See Enmund v. Florida, 458 U.S. 782, 801 (1982).

(D) The defendant intentionally engaged in conduct which –

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim. See Tison v. Arizona, 481 U.S. 137, 158 (1987).

In United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000), the court stated that "[t]he best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction." Instruction 12.06(1)(A) - (D) use the exact language of the statute.

See Instruction 7.05, *supra*. Francis v. Franklin, 471 U.S. 307, 315 (1985); Sandstrom v. Montana, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000).

Death Penalty - Final Instructions

12.07 STATUTORY AGGRAVATING FACTORS (18 U.S.C. § 3592) (Homicide)

If you unanimously find beyond a reasonable doubt that [the defendant] intentionally [committed the murder of] [committed acts resulting in the death of] (name of victim) in the manner described in Instruction [___], you must then proceed to determine whether the government has proved beyond a reasonable doubt the existence of [any of] the following alleged statutory aggravating factor(s) [with respect to the same murder(s).] If you unanimously make that finding in the affirmative [as to the murder of (name of victim)], you should so indicate in Section III on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding in the affirmative [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form, and follow the directions on page [___]. No further deliberations will be necessary [as to that murder].

The first statutory aggravating factor alleged by the government is that [LIST AGGRAVATING FACTOR FROM §§ 12.07A THROUGH 12.07P SEPARATELY FOR EACH KILLING AS APPROPRIATE]:

The second statutory aggravating factor alleged by the government is that [LIST AGGRAVATING FACTOR FROM §§ 12.07A THROUGH 12.07P SEPARATELY FOR EACH KILLING AS APPROPRIATE]:

The law directs you to consider and decide at this point the existence or nonexistence of only the statutory aggravating factors specifically claimed by the government. You are reminded that to find the existence of a statutory aggravating factor, your decision must be unanimous and beyond a reasonable doubt.

Committee Comments

The Constitution requires that the class of defendants eligible for the death penalty be narrowed by means of statutory aggravating factors that furnish principled guidance for the choice between death and a lesser penalty. See Maynard v. Cartwright, 486 U.S. 356, 361-64 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-33 (1980); Gregg v. Georgia, 428 U.S. 153, 201 & n.54 (1976).

Identifying at least one nonduplicative statutory aggravating factor at either the guilt phase or the penalty phase of the trial is sufficient to meet this requirement. See Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). An "aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)," Tuilaepa v. California, 512 U.S. 967, 972, 114 S. Ct. 2630, 2635 (1994).

The statutory aggravating factors under 18 U.S.C. § 3592(c) correspond generally to "traditional" statutory aggravating factors upheld by the Supreme Court in reviewing state death penalty statutes. An issue that commonly arises is whether one aggravating factor impermissibly duplicates another. Justice Thomas, joined by three other justices, noted in Jones v. United States, 527 U.S.373, 398 (1999) that:

> [w]e have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in McCullah and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. (citations and footnotes omitted).

Justice Thomas went on to point out that, even accepting for the sake of argument the duplication theory, in the Jones case the factors "as a whole were not duplicative - at best, certain evidence was relevant to two different aggravating factors." Id. at 399.

Lower courts have expressed concern about the problem of duplicative factors. As noted above in Note on Use 2, Instruction 12.06, *infra*, courts have warned of the dangers of submitting duplicative mental intent states to the jury. As to aggravating factors, in United States v. Bin Laden, 126 F. Supp.2d 290, 299 (S.D.N.Y. 2001), the court held that

> an aggravating factor that is necessarily and wholly subsumed by a different aggravator within the same death penalty notice is invalid per se and should not be submitted to the penalty jury for sentencing consideration. . . [A] duplicative aggravator of this sort serves no significant sentencing role other than to cloud the issues and place an unwarranted thumb on death's scale.

The court went on to state that

> the Government's attempt to spin off multiple freestanding aggravators from what should really only be one represents a strategy that should not be permitted. . . [T]he sole motivation for doing so is to ratchet up the number of aggravating factors and "give the government free reign to trump whatever mitigating factors are raised by the defendant." (United States v. Bradley,

880 F. Supp. 271, 285 (M.D. Pa. 1994).)

The Bin Laden court also reserved until after the jury returned a liability verdict the issue of whether a single aggravating factor may be alleged more than once, i.e., for each capital offense in a prosecution of multiple murders. The court noted that a "grouping" approach was taken in the McVeigh prosecution: each aggravating factor was alleged only once, even though both defendants faced eleven capital counts each. Id. n.14.

The Committee recommends that care be taken to ensure that aggravating factors, whether statutory or nonstatutory, are submitted in such a way that they do not impermissibly duplicate the requirements under sections 3591(a) and (b) or each other. As the Eighth Circuit held in Sloan v. Delo, 54 F.3d 1371, 1385 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996), where the death penalty statute calls for the weighing of aggravating circumstances against mitigating circumstances, "the invalidation of an aggravating circumstance is of tremendous import because the removal of that factor from the equation might change the result. See Stringer v. Black, 503 U.S. 222, 230-32 (1992)."

Death Penalty - Final Instructions

12.07A DEATH OR INJURY RESULTING IN DEATH DURING THE COMMISSION OF AN OFFENSE LISTED UNDER 18 U.S.C. § 3592(c)(1)

The [death] [injury resulting in death] occurred [during the [attempted] commission of] [during the immediate flight from the commission of] [state the qualifying offenses, e.g., kidnaping, listed under section 3592(c)(1)]. The government must prove beyond a reasonable doubt that [list elements of qualifying offense or attempt as in the corresponding verdict director, e.g., first, the defendant knowingly and willfully seized, confined, kidnaped, abducted, or carried away (name of victim); second, (name of victim) was thereafter transported in interstate commerce while so seized, confined, kidnaped, or abducted; and third, the defendant held (name of victim) for ransom, reward, or other benefit or reason.] [Alternatively, refer to separate count for which defendant was found guilty at the first stage.][1]

Notes on Use

1. There may be instances in which the qualifying offense listed under section 3592(c)(1) was not charged in the indictment. It is not necessary for the government to charge the qualifying offense in the indictment for it to be alleged as an aggravating factor.

Committee Comments

Section 3592(c)(1) establishes as an aggravating factor that the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of an offense under one of the following sections:

Title 18:

-- 32 (destruction of aircraft or aircraft facilities),
-- 33 (destruction of motor vehicles or motor vehicle facilities),
-- 36 (violence at international airports),
-- 351 (violence against Members of Congress, Cabinet Officers, or Supreme Court Justices),
-- 751 (prisoners in custody of institution or officer),
-- 794 (gathering or delivering defense evidence to aid foreign government),
-- 844(d) (transportation of explosives in interstate commerce for certain purposes),

-- 844(f) (destruction of Government property by explosives),
-- 1118 (prisoners serving life term),
-- 1201 (kidnaping),
-- 844(i) (destruction by explosives of property affecting interstate commerce),
-- 1116 (killing or attempted killing of diplomats),
-- 1203 (hostage taking),
-- 1992 (wrecking trains),
-- 2280 (maritime violence),
-- 2281 (maritime platform violence),
-- 2332 (terrorist acts abroad against U.S. Nationals),
-- 2339 (use of weapons of mass destruction),
-- 2381 (treason),

Title 49:

-- 1472(i) (aircraft piracy within special aircraft jurisdiction), and/or
-- 1472(n) (aircraft piracy outside special aircraft jurisdiction).

In United States v. Jones, 132 F.3d 232, 249 (5th Cir. 1998), aff'd, 527 U.S. 373 (1999), the court rejected defendant's contention that a statutory aggravating factor providing that defendant caused the death of the victim, which occurred during the commission of a kidnaping, failed to genuinely narrow the class of persons eligible for the death penalty. The court concluded that

> Although the jury had already found the defendant guilty of kidnaping with death resulting at the guilt phase of the trial, the jury did not consider whether [the defendant] caused the death of the victim during the commission of the crime of kidnaping until the penalty phase of the trial. The jury could have convicted [the defendant] of kidnaping with death resulting in the guilt phase of the trial and still answered "no" to statutory aggravating factor 2(A) in the penalty phase if the jury found that [the defendant] did not cause the death of the victim during the commission of the crime of kidnaping. The submission of the elements of the crime as an aggravating factor merely allowed the jury to consider the circumstances of the crime when deciding whether to impose the death penalty. Thus, the kidnaping was weighed only once by the jury during the penalty phase of the trial. Consequently, the repetition of the elements of the crime as an aggravating factor did not contradict the constitutional requirement that aggravating factors genuinely narrow the jury's discretion.

Accord United States v. Hall, 152 F.3d 381, 416-17 (5th Cir. 1998), abrogated in part on other grounds, United States v. Martinez-Salazar, 528 U.S. 304 (2000).

In a closely related issue, the courts are divided on the question whether this statutory aggravating factor is impermissibly duplicative and therefore improperly tilts the jury in favor of the death penalty. In United States v. Bin Laden, 126 F. Supp.2d 290, 301 (S.D.N.Y. 2001), the court rejected the duplication argument, concluding that it was proper for the jury to consider the crimes for which it had found the defendant guilty in determining sentencing, and that "the impermissible double-counting caused by an aggravator that is duplicative of another aggravator is simply not at issue here." Accord United States v. Johnson, 136 F. Supp.2d 553, 559 (W.D. Va. 2001); United States v. Cooper, 91 F. Supp.2d 90, 108-09 (D.D.C. 2000); United States v. Frank, 8 F. Supp.2d 253, 276 (S.D.N.Y. 1998); United States v. Edelin, 134 F. Supp.2d 59 (D.D.C. 2001) (§ 848).

On the other hand, the courts in United States v. McVeigh, 944 F. Supp. 1478, 1489-90 (D. Colo. 1996), and United States v. Kaczynski, 1997 WL 716487, at *23 (E.D. Cal. 1997), dismissed statutory aggravating factors which were based on the crimes alleged in those cases. The court in Kaczynski, at *23, stated that:

> To allow the jury to weigh as an aggravating factor a crime which they had already necessarily found beyond a reasonable doubt would unfairly tip the scale toward death. This skews the weighing process by beginning the penalty phase with one aggravating factor already on death's side of the scale. Furthermore, when dealing with a weighing statute, there is always the danger that one or more jurors will weigh by counting. (internal citations omitted)

Death Penalty - Final Instructions

12.07B DEFENDANT'S PRIOR CONVICTION OF A VIOLENT FELONY INVOLVING A FIREARM (18 U.S.C. § 3592(c)(2))

[The defendant] has been [previously] convicted[1] of [describe the federal or state offense punishable by a term of imprisonment of more than one year, involving the [use] [attempted use] [threatened use] of a firearm against another person.] [The term "firearm" means [any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive] [the frame or receiver of any such weapon] [any firearm muffler or firearm silencer] [any destructive device]. [It does not include an antique firearm.]

Notes on Use

1. Although section 3592(c)(2) uses language that the defendant "has previously been convicted," the statute does not make clear whether the jury may only consider convictions which occurred prior to the date of the murder with which the defendant was charged. Although there are as yet no federal cases on the issue, the majority of state courts that have examined this question have found that the term "prior conviction" in the context of a statutory aggravating factor simply means a conviction that has become final prior to the date of sentencing, regardless of the date of occurrence of the crime itself. Daugherty v. State, 419 S.2d 1067, 1069 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983), Ruffin v. State, 397 S.2d 277, 282 (Fla.), cert. denied, 454 U.S. 882 (1981), State v. Brooks, 541 S.2d 801, 809-10 (La. 1989), People v. White, 870 P.2d 424, 442-46 (Colo., en banc, 1994), People v. McClain, 757 P.2d 569 (1988), cert. denied, 489 U.S. 1072 (1989), People v. Grant, 755 P.2d 894 (1988), cert. denied, 488 U.S. 1050 (1989), People v. Hendrix, 737 P.2d 1350 (1987), cert. denied, 488 U.S. 900 (1988), Stephens v. Hopper, 247 S.E.2d 92, 97 (Ga.), cert. denied, 439 U.S. 991 (1978), Templeman v. Commonwealth, 785 S.W.2d 259, 260 (Ky. 1990), State v. Biegenwald, 542 A.2d 442, 446 (N.J. 1988), State v. Teague, 680 S.W.2d 785, 789-90 (Tenn. 1984), cert. denied, 473 U.S. 911 (1985). Thus, criminal activity subsequent to the present homicide has been found sufficient to support statutory aggravating factors requiring "prior convictions." See also State v. Coffey, 444 S.E.2d 431 (N.C. 1994), in which the North Carolina Supreme Court interpreted a statutory provision referring to "prior criminal activity" as opposed to "prior convictions." Of note, another North Carolina court has concluded that the term "prior convictions" includes convictions for offenses which occurred subsequent to the charged offense but became final prior to trial. See State v. McCullers, 335 S.E.2d 348, 350 (N.C. App. 1985).

On the other hand, in Thompson v. State, 492 N.E.2d 264 (Ind. 1986), the court held that the phrase "prior convictions" included only convictions which occurred prior to the presently charged murder. However, the court also held that the Indiana death penalty provisions specifically

allow the use as a statutory aggravating factor of the commission of another murder, regardless of when committed. Id. at 269.

Subsequent serious criminal activity can be used as nonstatutory aggravating evidence. United States v. Pitera, 795 F. Supp. 546, 564 (E.D.N.Y.), aff'd, 986 F.2d 499 (2d. Cir. 1992).

12.07C DEFENDANT'S PRIOR CONVICTION OF AN OFFENSE RESULTING IN DEATH FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS AUTHORIZED BY STATUTE (18 U.S.C. § 3592(c)(3), (d)(1))

[The defendant] has been [previously] convicted[1] of [name of offense], a [federal] [state] offense which resulted in the death of [name of victim], for which a sentence of life imprisonment or a sentence of death was authorized by statute.

Notes on Use

1. See Note on Use 1, Instruction 12.07B, *infra*.

12.07D DEFENDANT'S PRIOR CONVICTION OF TWO OR MORE OFFENSES INVOLVING THE INFLICTION OF SERIOUS BODILY INJURY OR DEATH (18 U.S.C. §§ 3592(c)(4), (d)(2))

[The defendant] has [previously] been convicted[1] of two or more [state] [federal] offenses each of which is punishable by a term of imprisonment of more than one year, committed on different occasions, and involves the [infliction of] [attempted infliction of] serious bodily injury upon another person, [summarize pertinent aspects of the predicate offense(s) including name of each offense and whether each offense involved infliction of or attempted infliction of seriously bodily injury upon another person].

Notes on Use

1. See Note on Use 1, Instruction 12.07B, *infra*.

12.07E CREATION OF A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS IN ADDITION TO THE VICTIM (18 U.S.C. § 3592(c)(5); 21 U.S.C. § 848(n)(5))

[In the commission of the offense] [In escaping apprehension for the offense], [the defendant] knowingly created a grave risk of death to one or more persons in addition to (the [intended][1] victim[s]) [summarize pertinent predicate facts].

To establish the existence of this factor, the government must prove that the defendant knowingly created a grave risk of death[2] to one or more persons in addition to the victim(s) of the offense, [in committing the offense] [or] [in escaping apprehension for the offense]. "Persons in addition to the victim(s)" include innocent bystanders in the zone of danger created by the defendant's acts, but does not include other participants in the offense.][3] "Grave risk of death" means a significant and considerable possibility that another person might be killed. "Knowingly" creating such a risk means that the defendant was conscious and aware that his conduct in the course of [committing the offense] [or] [escaping apprehension for the offense] might have this result.

[Knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant(s), and all the facts and circumstances in evidence which may aid in a determination of defendant's(s') knowledge.]

Notes on Use

1. This factor is broadly worded, and may be applicable to intended victims who escape death. *See, e.g.*, United States v. Tipton, 90 F.3d 861, 869, 894 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997). However, the court in United States v. Glover, 43 F. Supp.2d 1217, 1221-22 (D. Kan. 1999), held that this factor and the factor enumerated in section 3592(c)(16), that "the defendant attempted to kill more than one person," were impermissibly duplicative, and that the government had to strike one of the aggravators in advance of trial.

Some states whose capital punishment statutes include a similar aggravating factor have construed that aggravating factor as not including surviving intended victims. See, e.g., State v. Bracy, 703 P.2d 464, 481 (Ariz. En Banc 1985), cert. denied, 474 U.S. 1110 (1986); State v. Rossi, 706 P.2d 371, 378 (Ariz. En Banc 1985), cert. denied, 506 U.S. 1003 (1992); State v. McCall, 677 P.2d 920, 934 (Ariz. En Banc 1983), cert. denied, 467 U.S. 1220 (1984). Proximity to the murderous act

is an important factor in applying this aggravating circumstance. See Commonwealth v. Stokes, 615 A.2d 704, 713 (Pa. 1992) ("the aggravating circumstance at issue applies to situations when the defendant in the course of killing his particular victim acts in a manner which endangers the lives of others close in proximity to the intended or actual victim."); State v. Wood, 881 P.2d, 1158, 1174-75 (Ariz. En Banc 1994) ("The grave risk of death to another factor applies only if the defendant's murderous act itself put other people in the zone of danger. . . . No single factor is dispositive of this circumstance. Our inquiry is whether during the course of the killing, the defendant engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury.")

2. The term "knowingly create a grave risk of death" has been interpreted to mean "reckless disregard for human life," Tison v. Arizona, 481 U.S. 137, 157-58 (1987), or "extreme indifference to human life," Enmund v. Florida, 458 U.S. 782, 790-91 (1982).

The instruction given at the McVeigh trial reads as follows:

> This aggravating factor requires you to find that the defendant's conduct not only resulted in death but also posed a significant risk of death to other persons who were in close proximity to those who died in terms of time and location. The defendant must have acted knowingly in creating this grave risk of death to other persons, which means that he must have been conscious and aware of the grave risk of death, must have realized what he was doing, and must not have acted because of ignorance, mistake or accident.

3. See Note on Use 1, Instruction 12.07E, *infra*.

Committee Comments

See Profitt v. Florida, 428 U.S. 242, 256 (1976); Tison v. Arizona, 481 U.S. 137, 157-58 (1987); Francis v. Franklin, 471 U.S. 307, 315 (1985); Enmund v. Florida, 458 U.S. 782, 790-91 (1982); Sandstrom v. Montana, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 17.04 and 17.07 (5th ed. 2000).

In United States v. Allen, 247 F.3d 741, 786-87 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), the court rejected defendant's challenges that the "grave risk of death" aggravator was unconstitutionally vague and did not serve a narrowing function because it applied to too large a class of defendants.

12.07F COMMISSION OF THE OFFENSE IN AN ESPECIALLY HEINOUS CRUEL OR DEPRAVED MANNER (18 U.S.C. § 3592(c)(6))

[Defendant] committed the offense in an especially [heinous] [cruel] [or] [depraved] manner in that it involved [torture] [or] [serious physical abuse] to the victim, (name of victim) [summarize pertinent predicate facts]. To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture or serious physical abuse to the victim. You must not find this factor to exist unless you unanimously agree as to which alternative - torture or serious physical abuse - has been proved beyond a reasonable doubt. In other words, all twelve of you must agree that it involved torture and was thus heinous, cruel or depraved, or all twelve of you must agree that it involved serious physical abuse to the victim and was thus heinous, cruel or depraved.][1]

["Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.]

["Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.]

["Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.]

["Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted, and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, in addition to the killing of the victim.]

[Severe mental pain or suffering means prolonged mental harm caused by or resulting from [intentionally inflicting or threatening to inflict severe physical pain or suffering] [administering or applying, or threatening to administer or apply, mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality] [the threat of imminent death] [the threat that

another person will imminently be subjected to death, severe physical pain or suffering] [the threat that another person will imminently be subjected to the administering or applying, or threatening to administer or apply, mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality.]

["Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body. Serious physical abuse -- unlike torture -- may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse in addition to the killing.]

Pertinent factors in determining whether a killing was especially [heinous] [cruel] [or] [depraved] include: an infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; the needless mutilation of the victim's body; the senselessness of the killing; and the helplessness of the victim.

The word "especially" means highly or unusually great, distinctive, peculiar, particular, or significant, when compared to other killings.

Notes on Use

1. This statutory aggravator contains the disjunctive phrases "torture or serious physical abuse." The Committee concluded that juror unanimity as to one of these two disjunctive elements is required to support a finding of this aggravator. The Committee notes that in United States v. Jones, 132 F.3d 232 (5th Cir. 1998), aff'd, 527 U.S. 373 (1999), the instruction given did not require specific unanimity as to whether defendant inflicted torture or serious physical abuse. Id. at 250 n.12.

Committee Comments

"Heinous" means that a killing was "extremely wicked or shockingly evil." Sochor v. Florida, 504 U.S. 527, 537, 112 S. Ct. 2114, 2121 (1992) (quoting State v. Davis, 283 S.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)). "Cruel" means that the defendant intended "to inflict a high degree of pain." Id. "Depraved" means that the defendant "relished[d] the murder" or show[ed] indifference to the suffering of the victim." Walton v. Arizona, 497 U.S. 639, 654-55 (1990). Torture includes psychological as well as physical abuse of the victim. Id. at 652-56. However, the defendant must have specifically intended the abuse apart from the killing (Richmond v. Lewis, 506 U.S. 40, 45, 51, 113 S. Ct. 528, 533, 536 (1992), and the victim must have been conscious of the abuse (Sochor v.

Florida, 504 U.S. at 537, 112 S. Ct. at 2121). See also 18 U.S.C. 2340 (2); United States v. Jones, 132 F.3d 232, 249-50 (5th Cir.), aff'd, 527 U.S. 373 (1999); United States v. Hall, 152 F.3d 381, 414-16 (5th Cir. 1998); abrogated in part on other grounds, United States v. Martinez-Salazar, 528 U.S. 304 (2000).

This statutory language has been challenged as impermissibly vague and overbroad on its face. Maynard v. Cartwright, 486 U.S. 356, 362-65 (1988). But see Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) ("especially heinous, atrocious, or cruel" language is not unconstitutionally vague when limited to "conscienceless or pitiless crime which is unnecessarily torturous to the victim").

In United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000), the court concluded that the limiting instruction extensively defining the words "heinous," "cruel" and "depraved" cured any vagueness problem. The court also rejected defendant's contention that this factor and the vulnerable victim factor (4.03K) were impermissibly duplicative, finding that each of the factors was directed to entirely distinct aspects of the offense. Id.

12.07G PROCUREMENT OF COMMISSION OF THE OFFENSE BY PAYMENT OF SOMETHING OF PECUNIARY VALUE (18 U.S.C. § 3592(c)(7); 21 U.S.C. § 848(n)(6) and (7))

[The defendant] procured the commission of the offense by [payment] [promise of payment] of anything of pecuniary value [summarize pertinent predicate facts]. To establish that the defendant procured the commission of the offense by [payment] [promise of payment] of anything of pecuniary value, the government must prove, in essence, that the defendant arranged to have someone else commit the offense or assist in committing it. [There is no requirement that the government prove that something of pecuniary value actually changed hands.] To "procure commission of the offense" means to obtain it or bring it about. The words "payment or promise of payment" should be given their ordinary, everyday meaning which includes giving or offering compensation in return for services. "Anything of pecuniary value" means anything in the form of money, property, or anything else having some economic value, benefit, or advantage.

Committee Comments

Section 1958(b)(1), Title 18, United States Code, describes the term "anything of pecuniary value" as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage." United States v. Ransbottom, 914 F.2d 743, 745-46 (6th Cir.), cert. denied, 498 U.S. 971 (1990).

The court in United States v. Edelin, 134 F. Supp.2d 59, 80-81 (D.D.C. 2001) (§ 848), rejected vagueness and overbreadth challenges to this aggravator.

12.07H COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN (18 U.S.C. § 3592(c)(8); 21 U.S.C. § 848(n)(7))

[The defendant] committed the offense [as consideration for the receipt] [in the expectation of the receipt] of anything of pecuniary value [summarize pertinent predicate facts].

To establish that a defendant committed an offense [as consideration for the receipt] [in the expectation of the receipt] of anything of pecuniary value, the government must prove that the defendant committed the offense [in consideration for] [in the expectation of] anything in the form of money, property, or anything else having some economic value, benefit, or advantage. ["Consideration" in this context means a payment or promise of payment in return for services.] [There is no requirement that the government prove that something of pecuniary value actually changed hands.] [The words "receipt or expectation of receipt" should be given their ordinary, everyday meaning which includes obtaining or expecting to obtain something.]

Committee Comments

In United States v. Bernard, 299 F.3d 467, 483 (5th Cir. 2002), the Fifth Circuit held that "the application of the 'pecuniary gain' aggravating factor is limited to situations where 'pecuniary gain' is expected 'to follow as a direct result of the [murder],'" quoting United States v. Chanthadara, 230 F.3d 1237, 1263 (10th Cir. 2000). The Bernard court concluded that "this aggravating factor is only applicable where the jury finds beyond a reasonable doubt that the murder itself was committed 'as consideration for, or in the expectation of' pecuniary gain." 299 F.3d at 483.

However, in United States v. Walker, 910 F. Supp. 837 (N.D.N.Y. 1995), the district court addressed identical language contained in the Title 21 death penalty provision, 21 U.S. C. § 848(n)(7), and determined that the clause has two prongs: (1) "the offense was committed 'as consideration for the receipt' or (2) 'in expectation of the receipt' of something of pecuniary value." It held that the first prong is intended to cover murder-for-hire situations, but the second prong has a much wider scope and includes any murder where the murderer expected to receive anything of pecuniary value. 910 F. Supp. at 848-49. It also noted that the source of the pecuniary gain is irrelevant. 910 F. Supp. at 848-49. Accord United States v. Cooper, 91 F. Supp.2d 90, 105-06 (D.D.C. 2000).

The phrase "anything of pecuniary value" appears in 18 U.S.C. § 1958(b)(1). That statute defines the phrase as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage." United States v.

Ransbottom, 914 F.2d 743, 745-46 (6th Cir.), cert. denied, 498 U.S. 971 (1990).

The courts in United States v. Spivey, 958 F. Supp. 1523, 1531 (D.N.M. 1997) and United States v. Davis, 904 F. Supp. 554, 558 (E.D. La. 1995), rejected vagueness and overbreadth challenges to sections 848(n)(7) and 3592(c)(8), respectively.

As to impermissible duplication, the Eighth Circuit in United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000), found that any error in the use of pecuniary gain as a statutory aggravating factor because it was also an element of the underlying offense was harmless, given that the jury found two other aggravators beyond a reasonable doubt.

Death Penalty - Final Instructions

12.07I COMMISSION OF THE OFFENSE AFTER SUBSTANTIAL PLANNING AND PREMEDITATION (18 U.S.C. § 3592(c)(9); 21 U.S.C. § 848(n)(8))

[The defendant] committed the offense of (name of offense)[, as charged in Count ___ of the indictment], for which you have found [him] [her] guilty, after substantial planning and premeditation to cause the death of (name of victim). "Planning" means mentally formulating a method for doing something or achieving some end. "Premeditation" means thinking or deliberating about something and deciding whether to do it beforehand. "Substantial" planning and premeditation means a considerable or significant amount of planning and premeditation.[1]

Notes on Use

2. See United States v. McCullah, 76 F.3d 1087, 1110-11 (10th Cir. 1996) ("'Substantial' planning does not require `considerably more planning than is typical' but rather it means 'considerable' or 'ample for commission of the crime.'"), cert. denied, 520 U.S. 1213 (1997); United States v. Tipton, 90 F.3d 861, 896 (4th Cir.) ("substantial" means "more than the minimum amount sufficient to commit the offense" or "'more than merely adequate.'"), cert. denied, 520 U.S. 1253 (1996); United States v. Flores, 63 F.3d 1342, 1374 (5th Cir. 1995) ("substantial" denotes "a thing of high magnitude" and "the term alone, without further explanation, [is] sufficient to convey that meaning and to enable the jury to make an objective assessment."), cert. denied, 519 U.S. 825 (1996).

Committee Comments

The court in United States v. Glover, 43 F. Supp.2d 1217, 1225 (D. Kan. 1999), rejected a vagueness challenge to section 3592(c)(9). The court in United States v. Spivey, 958 F. Supp. 1523, 1531 (D.N.M. 1997), rejected vagueness and overbreadth challenges to the comparable aggravator in the Title 21 death penalty statute, section 848(n)(8).

12.07J DEFENDANT'S PRIOR CONVICTIONS FOR TWO OR MORE FELONY DRUG DISTRIBUTION OFFENSES (18 U.S.C. § 3592(c)(10), (d)(2); 21 U.S.C. § 848(n)(4))

[The defendant] has [previously][1] been convicted of two or more [State] [Federal] offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance, to wit: [summarize pertinent aspects of the predicate offense(s), including name of each offense and how each offense involved distribution of a controlled substance].

Notes on Use

1. See Note on Use 1, Instruction 12.07B, *infra*.

Death Penalty - Final Instructions

12.07K VULNERABLE VICTIM
(18 U.S.C. § 3592(c)(11); 21 U.S.C. § 848(n)(9))

[Name of victim] was particularly vulnerable due to [old age] [youth] [infirmity] [summarize pertinent predicate facts].

To establish the existence of this factor, the government must prove that the victim was particularly vulnerable due to old age, youth, or infirmity. The words "particularly" and "vulnerable" should be given their plain, ordinary, everyday meaning.

"Particularly" means especially, significantly, unusually, or high in degree. "Vulnerable" means subject to being attacked or injured by reason of some weakness. Thus, to be "particularly vulnerable" means to be especially or significantly vulnerable, or vulnerable to an unusual or high degree.

"Old age" means advanced in years, aged, elderly, or an old person, that is: any person who was, by reason of a condition related to old age, significantly less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

"Youth" means that the victim was a child, a juvenile, a young person, or a minor, that is: any person who was, by reason of youthful immaturity or inexperience, significantly less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

"Infirmity" means a mental or physical weakness, disability, deficiency, illness or condition which makes a person less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

Committee Comments

See Webster's Ninth New Collegiate Dictionary, 233, 424, 656, 858, 1323, 1335, 1369 (1990); Francis v. Franklin, 471 U.S. 307, 315 (1985); Sandstrom v. Montana, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 17.04 and 17.07 (5th ed. 2000); United States v. Pretlow, 779 F. Supp. 758, 774 (D.N.J. 1991) (youth).

In United States v. Johnson, 136 F. Supp.2d 553, 560 (W.D. Va 2001), the court struck this aggravator, which was based on the fact that the victim was pregnant. The court rejected the government's contention that it was not required to show a nexus between the victim's pregnancy and the crime, relying on the fact that "those state courts which have interpreted and applied similar aggravating factors have universally required that the victim's pregnancy-based vulnerability somehow contribute to the victim's injury or death." The court concluded that no nexus was shown - the victim was killed instantaneously by an explosive device, and nothing about her pregnancy weakened her ability to withstand the blast.

In United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000), the court rejected defendant's contention that the heinous, cruel and depraved factor (Instruction 12.07F) and the vulnerable victim factor were impermissibly duplicative, finding that each of the factors was directed to entirely distinct aspects of the offense. Id.

12.07L PREVIOUS CONVICTION FOR A FEDERAL NARCOTICS VIOLATION FOR WHICH A SENTENCE OF FIVE OR MORE YEARS MAY BE IMPOSED, OR PRIOR CONVICTION FOR A CONTINUING CRIMINAL ENTERPRISE (18 U.S.C. § 3592(c)(12), (d)(3); 21 U.S.C. § 848(n)(10))

[The defendant] had been convicted[1] of [[federal narcotics violation] for which a sentence of five or more years may be imposed] [engaging in a continuing criminal enterprise] [summarize pertinent aspects of the predicate offense(s)].

Notes on Use

1. The use of the past perfect tense "had" in this subsection makes it clear that the conviction must predate the charged murder. Compare Instructions 12.07B, 12.07C, 12.07D and 12.07J in which the past tense "has" is used. Subsequent serious criminal activity can be used as nonstatutory aggravating evidence. See United States v. Pitera, 795 F. Supp. 546, 564 (E.D.N.Y.), aff'd, 986 F.2d 499 (2d. Cir. 1992).

12.07M CONTINUING CRIMINAL ENTERPRISE INVOLVING DRUG SALES TO MINORS (18 U.S.C. §§ 3592(c)(13), (d)(5)(6) and (7); 21 U.S.C. § 848(n)(11); 21 U.S.C. §§ 802(8) (11))

The defendant committed the offense of [describe the pertinent offense, e.g., the details of distribution[1] in violation of 21 U.S.C. § 848(c) of controlled substances to persons under 21 in violation of 21 U.S.C. § 859] in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act.

Notes on Use

1. The term "distribution" may be defined if the meaning is unclear in the context of the case.

Committee Comments

See 21 U.S.C. 802(10) ("'dispense' means to deliver a controlled substance to an ultimate user"). Congress, by using the word "distribute" rather than the word "dispense," did not limit factor (n)(11) only to the distribution of drugs to minors for ingestion. Section (n)(11)'s reference to section 845 does not change this result. Section 845 (and section 859, to which it was transferred) proscribe "distributing a controlled substance to a person under twenty-one years of age" without any limitation that such distribution must be for the recipient's use. This applies equally to the similarly-worded aggravating factor contained in 18 U.S.C. § 3592(c)(13) for Title 18 homicides. Cf. 18 U.S.C. § 3592(d) (statutory aggravating factors for nonhomicidal drug offenses in violation of 18 U.S.C. § 3591(b)(1)-(2) at sections 3592(c)(5)-(7) separately enumerating distribution to persons under 21, distribution near schools, and using minors in trafficking). Had Congress intended this same distinction for the statutory aggravating factors for Title 21 and 18 homicides under sections 848(n)(11) and 3592(c)(13), respectively, Congress could (and presumably would) have indicated this in the same manner. Thus, such a distinction should not be "read into" the statutory aggravating factors under sections 848(n)(11) and 3592(c)(13) where, evidently, it was not intended by Congress.

Death Penalty - Final Instructions

12.07N COMMISSION OF THE OFFENSE AGAINST A HIGH PUBLIC OFFICIAL

[Defendant] committed the offense against [name of victim], who was at that time [specify position and/or activity which makes the victim a high public official as designated in section 3592(c)(14)].

Committee Comments

Section 3592(c)(14) establishes as an aggravating factor that the defendant committed the offense against:

> (A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;
>
> (B) a chief of state, head of government, or the political equivalent, of a foreign nation;
>
> (C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or
>
> (D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution --
>
> > (i) while he or she is engaged in the performance of his or her official duties;
> > (ii) because of the performance of his or her official duties; or
> > (iii) because of his or her status as a public servant.
>
> For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

12.07O DEFENDANT'S PREVIOUS CONVICTION FOR SEXUAL ASSAULT, CHILD MOLESTATION (18 U.S.C. § 3592(c)(15))

[The defendant] has previously been convicted of [describe the predicate offense of sexual assault or child molestation].[1]

Notes on Use

1. See Note on Use 1, Instruction 12.07B, *infra*.

Committee Comments

This factor can be applied only where the defendant is being sentenced pursuant to 18 U.S.C. §§ 2245 or 2251. See 18 U.S.C. §§ 2241-45 for pertinent definitions regarding "sexual assault" and "child molestation."

12.07P MULTIPLE KILLINGS OR ATTEMPTED KILLINGS (18 U.S.C. § 3592(c)(16); 18 U.S.C. § 3591(a)(2)(A))

[The defendant] intentionally [killed] [attempted to kill] [more than one person] [name or names of additional persons, if known] in a single criminal episode.

To establish the existence of this factor, the government must prove that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

"More than one person" means one or more other people in addition to killing the victim, _____, named in Count _____. In this case, the government alleges that the defendant intentionally killed or attempted to kill [describe the person(s) by name or other sufficient detail] in addition to killing the victim.

"Intentionally killing" a person means killing a person on purpose, that is: willfully, deliberately, or with a conscious desire to cause a person's death (and not just accidentally or involuntarily).

"Attempting to kill" a person means purposely doing some act which constitutes a substantial step (beyond mere preparation or planning) toward killing a person, and doing so with the intent to cause a person's death.

"A single criminal episode" is an act or series of related criminal acts which occur within a relatively limited time(s) and place(s), or are directed at the same person(s), or are part of a continuous course of conduct related in time, place, or purpose.

A person of sound mind and discretion may be presumed to have intended the ordinary, natural, and probable consequences of his knowing and voluntary acts. However, this presumption is not required. Thus, you may infer from the defendant's conduct that the defendant intended to kill a person if you find: (1) that the defendant was a person of sound mind and discretion; (2) that person's death was an ordinary, natural, and probable consequence of the defendant's acts (even if the person's death did not actually result, in the case of an attempt); and (3) that the defendant committed these acts knowingly and voluntarily. But once again, you are not required to make such an inference.

Death Penalty - Final Instructions

Committee Comments

See Black's Law Dictionary, 127, 810-11 (6th ed. 1990); Francis v. Franklin, 471 U.S. 307, 315 (1985); Sandstrom v. Montana, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000); United States v. Graham, 858 F.2d 986, 992 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989); United States v. Reeves, 594 F.2d 536, 541 (6th Cir.), cert. denied, 442 U.S. 946 (1979); United States v. Washington, 898 F.2d 439, 440-42 (5th Cir. 1990); Zito v. Moutal, 174 F. Supp. 531, 535-37 (N.D. Ill. 1959).

In United States v. Bin Laden, 126 F. Supp.2d 290, 300 (S.D.N.Y. 2001), the court rejected defendants' argument that the "multiple killings or attempted killings" aggravator was impermissibly duplicative of the "grave risk of death" aggravator or the "victim impact" aggravator. The court concluded that the multiple killings aggravator related to defendants' "particular desire that there be multiple victims, rather than just one - i.e., the sheer magnitude of the crime." It stated that the "grave risk of death" aggravator related to "defendants' mental state with respect to persons who were not the intended victims of the bombings." The "victim impact" aggravator, on the other hand, "highlight[ed] the objective human effects of Defendants' actions, as distinct from the Defendants' subjective mindset."

Death Penalty - Final Instructions

12.08 NONSTATUTORY AGGRAVATING FACTORS

[If you have found the existence of one or more statutory aggravating factors unanimously and beyond a reasonable doubt, you must then consider whether the government has proved the existence of [a] [any] non-statutory aggravating factor[s]. As in the case for statutory aggravating factors, you must unanimously agree that the government has proved beyond a reasonable doubt the existence of [any of] the alleged non-statutory aggravating factor[s][1] before you may consider such factor[s] in your deliberations on the appropriate punishment for the defendant in this case.

In addition to any statutory aggravating factors you have found, you are permitted to consider and discuss only the nonstatutory aggravating factor[s] specifically claimed by the government and listed below. You must not consider any other facts in aggravation which you think of on your own.

The [first] non-statutory aggravating factor alleged by the government is that [LIST AS APPROPRIATE] [THE FOLLOWING ARE EXAMPLES]:

1. [The defendant] participated in additional uncharged murders, attempted murders, or other serious crimes of violence [describe pertinent facts][2], and his participation in those acts tends to support imposition of the death penalty.[3]

2. [The defendant] would be a danger in the future to the lives and safety of other persons,[4] as evidenced by [describe pertinent facts]:

    a. specific threats of violence,[5]

    b. continuing pattern of violence,[6]

    c. low rehabilitative potential,[7]

    d. lack of remorse,[8]

    e. mental evaluation, i.e., psychopathic personality,[9]

    f. custody classification, and/or

    g. other.

and his dangerousness tends to support imposition of the death penalty.[10]

3. [The defendant] obstructed a criminal investigation, tampered with or retaliated against a witness, [describe pertinent facts],[11] and that [obstruction] [tampering] [retaliation] tends to support imposition of the death penalty.[12]

4. [Victim impact - the wording of this aggravator must be tailored to the facts of the case.][13]

At this point you must record your findings regarding whether you unanimously find that the government has proven beyond a reasonable doubt the existence of [this] [any of these] non-statutory aggravating factor[s] [with respect to the same murder]. Please enter that finding on [Page __] [the appropriate page] of the Special Verdict Form, and continue your deliberations.]

Notes on Use

1. Whether a factor is aggravating is a question of law, rather than a question of fact for the jury to decide. United States v. McCullah, 76 F.3d 1087, 1107 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997); United States v. McVeigh, 944 F. Supp. 1478, 1486 (D. Colo. 1996).

2. In United States v. Allen, 247 F.3d 741, 789-90 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), the court rejected defendant's contention that the "other criminal acts" aggravator is impermissibly duplicative of the six statutory aggravating factors based upon prior criminal acts and violates the Constitution. The court also held, on the facts of the case, that the aggravator was not impermissibly duplicative of the future dangerousness factor, because the government's evidence used to support the finding of each factor was sufficiently different. In United States v. Johnson, 136 F. Supp. 2d 553, 556 (W.D. Va. 2001), the court struck the "criminal livelihood" aggravator because there was nothing about the factor, and the non-adjudicated, non-violent criminal acts which the government presented in support of the factor, that were "particularly relevant to the sentencing decision."

3. To avoid jury confusion in the event that the jury finds that the facts supporting the aggravator have been proved but the jury does not consider those facts to be aggravating, each nonstatutory aggravating factor submitted to the jury should include language that the factor is aggravating as that term is defined in Instruction 12.01, *infra*.

4. The Supreme Court has approved consideration of a defendant's future dangerousness in capital sentencing, as both statutory and non-statutory aggravation. See Simmons v. South Carolina, 512 U.S. 154, 162-63, 114 S. Ct. 2187, 2193 (1994) (and cases cited therein). See also Jurek v.

Texas, 428 U.S. at 272-73 ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

As a general rule, "relevant, unprivileged evidence [of future dangerousness] should be admitted and its weight left to the factfinder[.]" Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (allowing expert testimony on future dangerousness). See, e.g., Johnson v. Texas, 509 U.S. 350, 355-56, 113 S. Ct. 2658, 2662-63 (1993) (affirming a death sentence where a finding of future dangerousness was based in part upon lay witness testimony about unadjudicated acts of violence committed by the defendant both prior and subsequent to the instant capital murder).

In United States v. Allen, 247 F.3d 741, 789-90 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), the court rejected defendant's contention that future dangerousness is duplicative of the statutory aggravating factors and violative of the Constitution. The court also reiterated the Supreme Court's holding in Simmons v. South Carolina, 512 U.S. at 178, that when future dangerousness is asserted as an aggravating factor, the jury must be instructed that the defendant is parole ineligible. Id. See Instruction 12.12. However, the court noted that "we have little doubt that future dangerousness to society and to prison officials and other inmates during incarceration is relevant to the jury's final determination. . . . A defendant in prison for life is still a risk to prison officials and to other inmates, and even though a life sentence without the possibility of parole greatly reduces the future danger to society from that particular defendant, there is still a chance that the defendant might escape from prison or receive a pardon or commutation of sentence." 247 F.3d at 788.

5. In United States v. Davis, 912 F. Supp. 938, 947 (E.D. La. 1996), aff'd, 132 F.3d 1454 (5th Cir. 1997), cert. denied, 118 S. Ct. 1331 (1998), the court held that "[t]hreatening words and warped bravado, without affirmative acts" were not admissible to prove future dangerousness.

6. Participation in additional uncharged homicides, attempted homicides, or other serious crimes of violence. See, e.g., United States v. Allen, 247 F.3d 741, 789 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002); United States v. Pitera, 795 F. Supp. at 564 (holding that the evidence of the defendant's participation in other murders was "relevant to his character and his propensity to commit violent crimes"). For the appropriateness of the nonstatutory aggravating factor of causing the death of a fetus, see United States v. Johnson, 136 F. Supp.2d 553, 561-62 (W.D. Va. 2001). See United States v. Glover, 43 F. Supp. 2d 1217, 1226 (D. Kan. 1999); United States v. Beckford, 964 F. Supp. 993 (E.D. Va. 1997), United States v. Walker, 910 F. Supp. 837, 852-54 (N.D.N.Y. 1995), and United States v. Bradley, 880 F. Supp. 271, 286-87 (M.D. Pa. 1994), for a discussion on whether and in what circumstances evidence of unadjudicated criminal conduct is admissible to prove future dangerousness.

7. Two courts have stricken "low potential for rehabilitation" as duplicative of future dangerousness, where the government alleged each as a separate nonstatutory aggravating factor. United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996), aff'd, 132 F.3d 1454 (5th Cir. 1997), cert. denied, 523 U.S. 1034 (1998); United States v. Nguyen, 928 F. Supp. 1525, 1543 (D. Kan. 1996). In United States v. Spivey, 958 F. Supp. 1523, 1535 (D.N.M. 1997), the court rejected defendant's contention that the phrase "low rehabilitative potential" was void for vagueness. In United States v. Davis, 912 F. Supp. at 946, the court concluded that, while the phrase was too vague to stand on its own as a separate nonstatutory aggravator, it could be used to prove future dangerousness.

8. In United States v. Nguyen, 928 F. Supp. 1523, 1541-42 (D. Kan. 1996), the court cautioned the government that the evidence it submits to prove lack of remorse must be "more than mere silence . . . and it may not implicate [defendant's] constitutional right to remain silent." In United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996), aff'd, 132 F.3d 1454 (5th Cir. 1997), cert. denied, 523 U.S. 1034 (1998), the court held that the government may not assert lack of remorse as an independent nonstatutory factor, but could argue it as probative of defendant's future dangerousness. Accord United States v. Cooper, 91 F. Supp. 2d 90, 113 (D.D.C. 2000).

9. Mental evaluation evidence may also be mitigating, and the jury must be allowed to give full effect to it as such. Penry v. Johnson, 532 U.S. ___, ___, 121 S. Ct. 1910, 1920 (2001).

10. See Note on Use 3.

11. See 18 U.S.C. §§ 1510, 1512, and 1513; United States v. Edelin, 134 F. Supp.2d 59, 77 (D.D.C. 2001). In United States v. Friend, 92 F. Supp.2d 534, 537, 545 (E.D. Va. 2000), the court struck the nonstatutory aggravating factor that defendant discussed killing a potential witness after the murder of the victim because it did not meet the relevance and heightened reliability standards required under the FDPA and the Supreme Court's death penalty jurisprudence.)

12. See Note on Use 3.

13. In Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991), the Supreme Court overruled its prior decisions in South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987), and held that the victim's personal characteristics and the impact of the murder on the victim's family may be considered in capital sentencing. Section 3593(a)(2) states that:

> The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense

and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

In United States v. Jones, 132 F.3d 232, 251 (5th Cir. 1998), the court concluded that language referring to the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," where the crime occurred, "fail[ed] to guide the jury's discretion, or distinguish this murder from any other murder." The court also noted that "the district court offered no additional instructions to clarify the meaning" of that language. Id. The court concluded that submission of a "victim vulnerability" nonstatutory aggravating factor in these circumstances was error, but that the error was harmless. Id. at 252. A plurality of four Justices of the Supreme Court disagreed, concluding that because the victim impact aggravator directed the jury to evidence specific to the case before it, the aggravator was not overbroad in a way that offends the Constitution. Jones v. United States, 527 U.S. 373, 401-02 (1999). Three of the Justices agreed with the lower court. Id. at 420.

Several Courts of Appeals have approved the admission of victim impact testimony: United States v. Allen, 247 F.3d 741, 778-79 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002); United States v. Barnette, 211 F.3d 803, 818-819 (4th Cir. 2000); United States v. Hall, 152 F.3d 381 (5th Cir. 1998), abrogated in part on other grounds, United States v. Martinez-Salazar, 528 U.S. 304 (2000); United States v. Webster, 162 F.3d 308 (5th Cir. 1998) (companion case to Hall, same result. Id. at 321); United States v. Battle, 173 F.3d 1343 (11th Cir. 1999); United States v. McVeigh, 153 F.3d 1166, 1218-23 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999). The Tenth Circuit in McVeigh found victim impact testimony such as the unique qualities of the victims, the witnesses' last contacts with the victims, and the impact of learning of the victims' deaths to be appropriate under Payne v. Tennessee, 501 U.S. 808 (1991). In United States v. Bernard, 299 F.3d 467, 478-79 (5th Cir. 2002), the court held that evidence of the victims' religious beliefs, and of the victims' parents' reliance on their religious beliefs for comfort, were not unduly prejudicial. The court in Bernard found other evidence introduced during the victim impact portion of the sentencing phase to be error, but not plain error. Id. at 480-81.

For an extensive discussion of types of victim-impact testimony properly admitted in the circumstances of the Oklahoma City bombing case, see United States v. McVeigh, 153 F.3d at 1216-22.

See Note on Use 3.

Committee Comments

The Supreme Court has held that the Constitution allows consideration of nonstatutory aggravating factors "relevant to the character of the defendant or the circumstances of the crime[,]"

Barclay v. Florida, 463 U.S. 939, 967 (1983), after at least one statutory aggravating factor that narrows the class of defendants eligible for the death penalty is found, Zant v. Stephens, 462 U.S. 862, 878 (1983). In Tuilaepa v. California, 512 U.S. 967, 976, 114 S. Ct. 2630, 2637 (1994), the Supreme Court stated that:

> our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. See, e.g., Woodson, 428 U.S. at 304, 96 S. Ct., at 2991 ("consideration of . . . the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death"). . . . We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. . . . The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

Furthermore, as the court stated in United States v. Bin Laden, 126 F. Supp.2d 290, 302 (S.D.N.Y. 2001): "Congress allowed for the admission of non-statutory aggravating factors precisely because it could not foresee every criminal circumstance that might arise." At the same time, a nonstatutory aggravating factor must be "sufficiently indicative of a defendant's disdain for human life" to warrant its submission to the jury. Id. at 302-03. The Bin Laden court rejected as an appropriate nonstatutory aggravating factor that defendants disrupted important governmental functions, concluding that the factor was "simply not sufficiently indicative" of defendants' disdain for human life. Id. at 303. The court in United States v. Cuff, 38 F. Supp.2d 282, 288-89 (S.D.N.Y. 1999), rejected as a nonstatutory aggravating factor that firearms had been used in connection with the homicides, concluding that "use of a firearm does not, in any rational sense, make a homicide worse."

The added protections of written notice in advance of trial under section 3593(a) and proof beyond a reasonable doubt under section 3593(c), which are not required for sentencing information in non-capital cases, are intended to meet the constitutional requirements for "heightened procedural safeguards" in capital cases to ensure fairness and consistency in the imposition of the death penalty. See, e.g., United States v. Pretlow, 779 F. Supp. 758, 770 (D.N.J. 1991) (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

Defendants typically make vagueness, overbreadth, and duplication challenges to nonstatutory aggravating factors. As to vagueness, Justice Thomas, joined by three other justices, reiterated recently in Jones v. United States, 527 U.S. 373, 400 (1999), that

> Ensuring that a sentence of death is not so infected with bias or caprice is our "controlling objective when we examine eligibility and selection factors for vagueness." Tuilaepa v. California, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). Our vagueness

> review, however, is "quite deferential." Ibid. As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster. Ibid.

See also Walton v. Arizona, 497 U.S. 639, 655 (1990).

As to overbreadth, Justice Thomas, joined by three other justices, stated in Jones, 527 U.S. at 401, with reference to victim vulnerability and victim impact factors:

> We have not . . . specifically considered what it means for a factor to be overbroad when it is important only for selection purposes and especially when it sets forth victim vulnerability or victim impact evidence. . . . Even though the concepts of victim impact and victim vulnerability may well be relevant in every case, evidence of victim vulnerability and victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer should consider all of the circumstances of the crime in deciding whether to impose the death penalty. See Tuilaepa, 512 U.S. at 976, 114 S. Ct. 2630.
>
> What is of common importance at the eligibility and selection phases is that "the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." Id. at 973, 114 S. Ct. 2630. So long as victim vulnerability and victim impact factors are used to direct the jury to the individual circumstances of the case, we do not think that principle will be disturbed.

As to duplication, Justice Thomas, joined by three other justices, noted in Jones, 527 U.S. at 398 that:

> We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in McCullah and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor.

Justice Thomas went on to point out that, even accepting for the sake of argument the duplication theory, in the Jones case the factors "as a whole were not duplicative–at best, certain evidence was relevant to two different aggravating factors." Id. at 399.

Whether a particular nonstatutory aggravating factor impermissibly duplicates one of the statutory aggravating factors is an issue that has arisen in several of the lower courts. See generally

Committee Comments to 4.03, *infra*; United States v. Bin Laden, 126 F. Supp.2d 290, 298-99 (S.D.N.Y. 2001) and cases therein cited. In Bin Laden, the court concluded that the nonstatutory aggravating factor that defendants targeted high public officials of the United States serving abroad was not impermissibly duplicative of the statutory aggravating factor that the offense involved a high public official. (Instruction 12.07N) Id. at 302. In United States v. Cooper, 91 F. Supp.2d 90, 108-09 (D.D.C. 2000), the court concluded that inclusion of seven racketeering acts charged in the indictment and found by the jury in the case before it as part of the "other criminal activity" nonstatutory aggravating factor was not impermissibly duplicative.

The court in United States v. Johnson, 1997 WL 534163, *6 (N.D. Ill. Aug. 20, 1997), rejected defendant's contention that the nonstatutory aggravating factor "vileness of the crime" was impermissibly duplicative of the statutory aggravating factor "heinous, cruel, or depraved manner of committing the offense." The court explained that

> statutory factors narrow the class of defendants eligible for the death penalty, whereas non-statutory factors serve the separate "individualizing" function that ensures the "jury [has] before it all possible relevant information about the individual defendant whose fate it must determine." Walker, 910 F. Supp. at 855 (quoting Jurek v. Texas, 428 U.S. 262, 276 (1976)). There is no reason to believe that by choosing one factor for one purpose Congress excluded the use of related (and even broader) factors for a completely separate purpose. Id.; Spivey, 958 F. Supp. at 1534-35.

Whether the government can reallege as a separate nonstatutory aggravating factor one or more of the mental states listed in sections 3591(a)(2)(A)-(D) is also currently being litigated. The court in United States v. Nguyen, 928 F. Supp. 1525, 1538-40 (D. Kan. 1996), rejected defendant's contention that to do so would result in impermissible duplication. Accord United States v. Cooper, 91 F. Supp.2d 90, 109-10 (D.D.C. 2000). The court in United States v. Chanthadara, 928 F. Supp. 1055, 1059 (D. Kan. 1996), held, however, that the government could not submit as aggravating factors overlapping mental states listed in sections 3591(a)(2)(A)-(D) to the jury; to do so would be impermissibly duplicative.

Defendants have argued that the death penalty provisions under section 3591, et seq. impermissibly permit the prosecutor to define and the jury to consider non-statutory aggravating factors in violation of the nondelegation doctrine. This contention has been uniformly rejected by courts construing this statute and 21 U.S.C. § 848. See United States v. Allen, 247 F.3d 741, 758-59 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000); United States v. Pitera, 795 F. Supp. 546, aff'd, 986 F.2d 499 (2d Cir. 1992); United States v. Cooper, 754 F. Supp. 617, 626, aff'd, 19 F.3d 1154 (7th Cir. 1994).

Defendants have also asserted an ex post facto challenge. This too has been rejected. The limited function of nonstatutory aggravating factors under the statute does not change either the elements of the crime or the quantum of punishment attached to the crime; thus, there is no violation of the ex post facto clause of the Constitution. See United States v. Allen, 247 F.3d 741, 759 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002). See also Miller v. Florida, 482 U.S. 423, 430, 433 (1987) (no ex post facto violation if a change does not increase punishment beyond what was prescribed when the crime was committed); Walton v. Arizona, 497 U.S. 639, 648 (1990) (even statutory "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment" which have otherwise been established by the statute) (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)).

Finally, defendants have contended that "the lack of proportionality review combined with the prosecutor's unrestrained authority to allege non-statutory aggravating factors" renders the Title 18 death penalty statute unconstitutional. The court in United States v. Jones, 132 F.3d at 240, rejected this contention, concluding that the statute "is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review."

Death Penalty - Final Instructions

12.09 MITIGATING FACTORS

Before you may consider the appropriate punishment, you must consider whether the defendant has established the existence of [a] [any] mitigating factor[s]. A mitigating factor is a fact about the defendant's life or character, or about the circumstances surrounding the offense(s) that would suggest, in fairness, that a sentence of death is not the most appropriate punishment, or that a lesser sentence is the more appropriate punishment.

Unlike aggravating factors, which you must unanimously find proved beyond a reasonable doubt in order to consider them in your deliberations, the law does not require unanimous agreement with regard to mitigating factors. Any juror persuaded of the existence of a mitigating factor must consider it in this case. Further, any juror may consider a mitigating factor found by another juror, even if he or she did not find that factor to be mitigating.[1]

It is the defendant's burden to establish any mitigating factors, but only by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A factor is established by a preponderance of the evidence if its existence is shown to be more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, produces in your mind the belief that what is sought to be established is, more likely than not, true. [In Part V of the Special Verdict Form relating to mitigating factors, you are asked [, but not required,][2] to report the total number of jurors that find a particular mitigating factor established by a preponderance of the evidence.]

Notes on Use

1. In Jones v. United States, 527 U.S. 373, 377 (1999), the Supreme Court held that the jury may consider a mitigating factor in its weighing process so long as one juror accepts the factor as mitigating by a preponderance of the evidence.

2. The court in United States v. Chandler, 996 F.2d 1073, 1087 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994), construed similar language in 21 U.S.C. § 848(k) as requiring that the jury be informed that it has the **option** to return written findings as to mitigating factors. The Committee recommends that, in order to facilitate appellate review, the jury be required to make written findings as

to mitigating factors. However, if the defendant objects to the return of written findings, the court may be advised, based on Chandler, to give the jury the option. Note that in United States v. Paul, 217 F.3d 989, 999, n.6 (8th Cir. 2000), the court questions whether it is even able to review the jury's findings regarding the number of jurors who found a particular mitigator, because the FDPA does not require the jury to make special findings regarding mitigating factors.

Committee Comments

The Constitution requires that a death penalty statute must permit the defendant to raise any aspect of character or background and the circumstances of the offense as a mitigating factor. Penry v. Johnson, 532 U.S. ___, ___, 121 S. Ct. 1910, 1920 (2001); Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); Lockett v. Ohio, 438 U.S. 586, 604 (1978). This includes a wide range of relevant factors. See, e.g., Johnson v. Texas, 509 U.S. 350, 367-68, 113 S. Ct 2658, 2668-69 (1993) (lack of maturity and underdeveloped sense of responsibility); Graham v. Collins, 506 U.S. 461, 475-76, 113 S. Ct. 892, 901-02 (1993) (family background and positive character traits); Penry v. Lynaugh, 492 U.S. at 328 (mental retardation and childhood abuse); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (good conduct in jail between arrest and trial); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (youth and susceptibility to influence); Lockett v. Ohio, 438 U.S. at 607-08 (victim involvement, impaired capacity, and substantial duress, coercion, or provocation).

In Lockett v. Ohio, the Court cautioned that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n.12. See California v. Brown, 479 U.S. 538, 542 (1987) (holding that "mere sympathy" is not a proper consideration in determining whether to impose a death sentence); United States v. Edelin, 134 F. Supp.2d 59, 69 (D.D.C. 2001) (holding that, while race in and of itself is not a proper mitigating factor, "`the effects and experiences of race may be admissible,'" (quoting United States v. Webster, 162 F.3d 308, 356-57 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999) (emphasis in original)).

The question exists whether the fact that, if the jury does not impose the death sentence, defendant must be sentenced to life in prison without the possibility of parole, is a mitigating factor. In Simmons v. South Carolina, 512 U.S. 154, 156, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that where a defendant's future dangerousness was at issue and the only sentencing alternative to the death penalty under state law was life imprisonment without possibility of parole, due process required that the sentencing jury be informed that the defendant was ineligible for parole. The Court reiterated that holding in Shafer v. South Carolina, 532 U.S. 36, 51, 121 S. Ct. 1263, 1273 (2001). However, the court in United States v. Chandler, 996 F.2d 1073, 1086 (11th Cir. 1993), held that the "possibility" of receiving a sentence of life imprisonment without parole is not a relevant mitigating factor), cert. denied, 512 U.S. 1227 (1994); accord Byrne v. Butler, 845 F.2d 501, 507 (5th Cir.),

cert. denied, 487 U.S. 1242 (1988).

Evidence of mitigating factors, like that of aggravating factors, may be considered regardless of admissibility under the Federal Rules of Evidence, except where its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. 18 U.S.C.§ 3593(c). (Under 21 U.S.C. § 848(j), evidence is admissible except where its probative value is substantially outweighed by the danger of unfair prejudice.)

Both 21 U.S.C. § 848(k) and 18 U.S.C. § 3593(d) provide that any mitigating factor may be considered without limitation by the jury. In Jones v. United States, 527 U.S. 373, 377 (1999), the Supreme Court indicated that all jurors may consider a mitigating factor found by any juror. No special finding or unanimous verdict -- or even a vote -- is required. See McKoy v. North Carolina, 494 U.S. 433 (1990) (statutory requirement for unanimous finding as to mitigating factors violated Eighth and Fourteenth Amendments); Mills v. Maryland, 486 U.S. 367 (1988) (death sentence reversed because the instructions and verdict form could be interpreted as precluding jury consideration of any mitigating factor in the absence of unanimous agreement).

Death Penalty - Final Instructions

12.10 MITIGATING FACTORS ENUMERATED (18 U.S.C. § 3592(a))

The mitigating factors which the defendant asserts he has proved by a preponderance of the evidence are: (Include any of the following applicable mitigating factors)

1. [Defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, regardless of whether his capacity was so impaired as to constitute a defense to the charge.

2. [Defendant] was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

3. [Defendant] is punishable as a principal in the offense, which was committed by another, but his participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

4. Another defendant or defendants, equally culpable in the crime, will not be punished by death.

5. [Defendant] does not have a significant prior history of other criminal conduct.

6. [Defendant] committed the offense under severe mental or emotional disturbance.

7. The victim consented to the criminal conduct that resulted in the victim's death.

[8. [Defendant] demonstrated severe learning problems in school, which led to academic failure, increased frustration, and eventual dropout, and those problems tend to indicate that defendant should not be sentenced to death.][1]

You are permitted to consider anything else about the commission of the crime or about [defendant's] background or character that would mitigate against imposition of the death penalty. If there are any such mitigating factors, whether or not specifically argued by defense counsel, which are established by a preponderance of the evidence, you are free to consider them in your deliberations.

In Part V on Page ___ of the Special Verdict Form, you are [asked] to identify any mitigating factors that any one of you finds has been proved by a preponderance of the evidence [, but you are

not required to do so][2].

Notes on Use

1. To avoid jury confusion in the event that a juror concludes that the facts supporting the mitigator have been proved but does not consider those facts to be mitigating, each mitigating factor falling within the "catch-all" section 3592(a)(8) provision should include language that the factor is mitigating as that term is defined in Instruction 12.01.

2. See Note on Use 1, Instruction 12.09, *infra*.

Committee Comments

Source: 18 U.S.C. § 3593(d). See Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); Lockett v. Ohio, 438 U.S. 586, 604, 607-08 (1978); United States v. Chandler, 996 F.2d 1073, 1086-88 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994); United States v. Pitera, 795 F. Supp. 546, 564 (E.D.N.Y.), aff'd, 986 F.2d 499 (2d Cir. 1992). See also Johnson v. Texas, 509 U.S. 350, 367-68, 113 S. Ct 2658, 2668-69 (1993); Graham v. Collins, 506 U.S. 461, 475-76, 113 S. Ct. 892, 901-02 (1993); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

Many factors, both aggravating and mitigating, may be factually true, and yet not be perceived by a juror as aggravating or mitigating. For instance, in United States v. Paul, 217 F.3d 989, 1000 (8th Cir. 2000), one of the mitigating factors submitted to the jury was the fact that defendant was eighteen when he committed the offense. The court found no error in the failure of six jurors to find his age as mitigating, concluding that a juror is not required to give mitigating effect to any factor. Accord United States v. Bernard, 299 F.3d 467, 485-86 (5th Cir. 2002). To prevent confusion, the Committee suggests that nonstatutory aggravating and mitigating factors include some version of the phrase "and that fact tends to [support] [mitigate] imposition of the death penalty." See Note on Use 4, Instruction 12.08, *infra*.

12.11 WEIGHING AGGRAVATION AND MITIGATION

If you find unanimously and beyond a reasonable doubt [that defendant was eighteen years of age or older when he committed the offenses;] that he acted with the requisite intent; and that the government proved the existence of at least one statutory aggravating factor; and after you then determine whether the government proved the existence of the nonstatutory aggravating factors submitted to you, and whether the defendant proved the existence of any mitigating factors, you will then engage in a weighing process.[1] In determining the appropriate sentence, all of you must weigh the aggravating factor or factors that you unanimously found to exist -- whether statutory or nonstatutory - and each of you must weigh any mitigating factor(s) that you individually found to exist, and may weigh any mitigating factor(s) that [another] [others] of your fellow jurors found to exist. In engaging in the weighing process, you must avoid any influence of passion, prejudice, or undue sympathy. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that the law leaves entirely to you.

The process of weighing aggravating and mitigating factors against each other [or weighing aggravating factors alone, if there are no mitigating factors,] in order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating [and mitigating] factors and reach a decision [based on which number is greater]; you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined, or that the aggravating factor(s) proved [does] [do] not, standing alone, justify imposition of a sentence of death. If one or more of you so find, you must return a sentence of life in prison without possibility of release [or a lesser sentence to be determined by the court]. Similarly, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of

death. You are to decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process.

If you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors which any of you found to exist to justify a sentence of death, [or in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death], and that therefore death is the appropriate sentence in this case, you must record your determination that a sentence of death shall be imposed in Section [V] [VI](a), on [Page __ of] the Special Verdict Form.

[Continue with Option A or Option B, as appropriate]

Option A: To be given if the statute requires that the sentence be death or life imprisonment without possibility of parole:

If you determine that death is not justified, you must complete Section [V] [VI](a) of the Special Verdict Form, and you must then record your determination that defendant be sentenced to life imprisonment without possibility of release[2] in Section [V] [VI](b)on [Page __ of] the Special Verdict Form.]

Option B: To be given if the statute allows a sentence less than life imprisonment without possibility of release:

If you determine that death is not justified, you must complete Section [V] [VI](a) of the Special Verdict Form, and then determine whether the appropriate punishment is life in prison without possibility of release. Record that determination in Section [V] [VI](b)on [Page __ of] the Special Verdict Form.] If you do not return a punishment of death or life imprisonment without possibility of release, the court must sentence the defendant to a lesser punishment as provided by law. [That sentence may or may not be life imprisonment.] [There is no parole in the Federal system.]

Notes on Use

1. If no mitigators are offered, the Committee suggests that a record be made that defendant knows he has the right to offer evidence of mitigating factors, and agrees with his attorneys' decision

not to do so. If no evidence of mitigating factors is offered, the instructions should be modified so that the defendant will not be prejudiced by references to mitigating factors when there are none.

2. In Shafer v. South Carolina, 532 U.S. 36, 121 S. Ct. 1263 (2001), the Supreme Court reiterated its holding in Simmons v. South Carolina, 512 U.S. 154 (1994), that a jury considering whether to impose the death penalty or life imprisonment must be instructed that life imprisonment means life imprisonment without possibility of parole whenever defendant's future dangerousness is placed in issue.

Committee Comments

In United States v. Allen, 247 F.3d 741, 780-82 (8th Cir. 2001), judgment vacated and remanded on other grounds, 122 S. Ct. 2653 (2002), the Eighth Circuit held that this instruction and Instruction 1.01 (the preliminary instruction), which were given to the jury in the case, "accurately explain the jury's role in sentencing under the FDPA." The court also held that the district court did not abuse its discretion in refusing to give the defendant's "mercy" instruction, which closely followed the language in the Title 21 statute to the effect that the jury, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence." It concluded that

> Under the FDPA, the jury exercises complete discretion in its determination of whether the aggravating factors outweigh the mitigating factors. The jury was informed that whether or not the circumstances justify a sentence of death was a decision left entirely to them. Mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances. The FDPA merely precludes the jurors from arbitrarily disregarding its unanimous determination that a sentence of death is justified.

12.12 CONSEQUENCES OF DELIBERATIONS (18 U.S.C. § 3594)

At the end of your deliberations, if you unanimously determine that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the court is required to impose that sentence. [Continue with Option A or Option B, as appropriate]

Option A, to be given if defendant may be sentenced to death, life without parole, or a lesser sentence:

If you determine the defendant should be sentenced to a lesser sentence, or if you cannot unanimously agree whether [the defendant] should be sentenced to death or life imprisonment without possibility of release, the court will sentence the defendant to a sentence other than death, which must be a term of imprisonment without parole and may be up to life imprisonment without the possibility of release.[1] The court will determine what that sentence should be, and you should not speculate on the sentence the defendant might receive.] [There is no parole in the federal system.]

Option B, to be given if defendant must be sentenced either to death or life in prison without possibility of parole:

If you cannot unanimously agree whether [the defendant] should be sentenced to death or life imprisonment without possibility of release, the court will sentence the defendant to a minimum of life in prison and may sentence the defendant to life imprisonment without the possibility of release. [There is no parole in the federal system.]

Notes on Use

1. In Jones v. United States, 527 U.S. 373, 380 (1999), the Supreme Court held that if the jury reaches a result other than a unanimous verdict recommending a sentence of death or of life imprisonment without possibility of release, the district court shall impose a sentence less than death. The Court also held that the Eighth Amendment does not require that the jury be instructed regarding the consequences of their failure to agree. Id. Finally, the Court declined to exercise its supervisory powers to require that such an instruction be given in every case. Id. at 382-83.

Death Penalty - Final Instructions

Committee Comments

See U.S.S.G. §§ 2A1.1 and 5K2.0; Simmons v. South Carolina, 512 U.S. 154, 156, 114 S. Ct. 2187, 2190 (1994); California v. Ramos, 463 U.S. 992, 1011-14 (1983); United States v. Chandler, 996 F.2d 1073, 1086 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994); United States v. Villarreal, 963 F.2d 725, 727 (5th Cir.), cert. denied, 506 U.S. 926 (1992); Byrne v. Butler, 845 F.2d 501, 507 (5th Cir.), cert. denied, 487 U.S. 1242 (1988); United States v. Pitera, 795 F. Supp. 546, 552 (E.D.N.Y.), aff'd, 986 F.2d 499 (2d Cir. 1992). See generally "Prejudicial effect of statement or instruction of court as to possibility of parole or pardon," 12 A.L.R. 3d 832 (1967).

12.13 JUSTICE WITHOUT DISCRIMINATION (18 U.S.C. § 3593(f))

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim(s). You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin, or sex of either the defendant [and] [or any] victim.[1]

To emphasize the importance of this consideration, Section [VI] [VII] of the Special Verdict Form contains a certification statement. Each juror should carefully read the statement, and sign in the appropriate place if the statement accurately reflects the manner in which each of you reached your decision.

Notes on Use

1. Some courts have held that section 3593(f) only prohibits consideration of these factors as aggravating; the jury may consider them as mitigating factors in appropriate circumstances. See, e.g., United States v. Walker, 910 F. Supp. 837, 857 (N.D.N.Y. 1995); United States v. Nguyen, 928 F. Supp. 1525, 1547 (D. Kan. 1996) and cases cited therein. However, the court in United States v. Cooper, 91 F. Supp.2d 90, 101-02 (D.D.C. 2000), concludes that "in light of the Supreme Court's mandate in Zant that race be 'totally irrelevant to the sentencing process,' 462 U.S. at 318, 103 S. Ct. at 2368, . . . this interpretation may be problematic." It cites the court's conclusion in United States v. Webster, 162 F.3d 308, 355 (5th Cir. 1998) that these factors cannot be considered as either mitigating or aggravating factors. It goes on to make the distinction that neither the Constitution nor the FDPA precludes the jury from considering "the defendant's experiences resulting from his race, color, religion, national origin or gender, and the effect those experiences have had on his life." Cooper, 91 F. Supp.2d at 90. Accord United States v. Edelin, 134 F. Supp.2d 59, 69 (D.D.C. 2001).

Committee Comments

See Zant v. Stephens, 462 U.S. 862, 885 (1983).

12.14 DEFENDANT'S RIGHT NOT TO TESTIFY

[Defendant] did not testify. There is no burden upon a defendant to prove that he or she should not be sentenced to death. The burden is entirely on the prosecution to prove that a sentence of death is justified. Accordingly, the fact that [a] defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your decision.

Committee Comments

See Instruction 4.01, infra. This instruction should only be given upon request of the defendant. The Committee recommends the practice of inquiring, on the record, whether the defendant desires this instruction.

Death Penalty - Final Instructions

12.15 - 12.19 [Reserved for Future Use]

Death Penalty - Final Instructions

12.20 SPECIAL VERDICT
(18 U.S.C. § 3593(d); 21 U.S.C. § 848(k), (q))

I have prepared a form entitled "Special Verdict Form" to assist you during your deliberations. You are required to record your decisions on this form.

[Section I of the Special Verdict Form contains space to record your findings on defendant's age;] Section [I] [II] contains space to record your findings on the requisite mental state; Section [II] [III] contains space to record your findings on statutory aggravating factors; and Section [III] [IV] contains space to record your findings on non-statutory aggravating factors. Section [IV] [V] of the Special Verdict Form contains space to record your findings on mitigating factors. [Add the following language, if the court determines that written findings should not be required. See Note on Use 1, Instruction 12.09, *infra*] [if you choose to do so. If you choose not to do so, cross out each page of Section [IV] [V] with a large "X." [In this case, [the defendant] has requested that you [do] [do not] record written findings on the mitigating factors.]]

You are each required to sign the Special Verdict Form.

Committee Comments

See United States v. Chandler, 996 F.2d 1073, 1086-88 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994). See Schad v. Arizona, 501 U.S. 624, 644, 111 S. Ct. 2491, 2504 (1991).

Death Penalty - Final Instructions

12.21 CONCLUDING INSTRUCTION

If you want to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the [marshal] [bailiff] who will bring it to my attention.

I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, with any message or question you might send, that you should not tell me any details of your deliberations or how many of you are voting in a particular way on any issue.

Let me remind you again that nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your decision should be. The decision is your exclusive responsibility.

Committee Comments

Lowenfield v. Phelps, 484 U.S. 231, 239-40 (1988); Brasfield v. United States, 272 U.S. 448, 450 (1926); United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989).

The district court has the option to give an Allen instruction in appropriate circumstances. Jones v. United States, 527 U.S. 373, 382 n. 5 (1999); Lowenfield v. Phelps, 484 U.S. 231, 237-40 (1988); Allen v. United States, 164 U.S. 492, 501-02 (1896). Instruction 10.02, infra, must be modified if it is to be used in a death penalty case.

12.22 SPECIAL VERDICT FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA *

v. * **CRIMINAL NO. _____**

[THE DEFENDANT] *

SPECIAL VERDICT FORM

MURDER OF (Name of Victim) BY (DEFENDANT)

[I. [AGE OF DEFENDANT (Unless the defendant stipulates that he/she was eighteen years of age at the time of the offense. See Note on Use 4, Instruction 12.1.01, *infra*.)

Instructions: Answer "YES" or "NO." Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that:

(The defendant) was eighteen years of age or older at the time of the offense.

YES _____

NO _____

_____
Foreperson

Instructions: If you answered "NO" with respect to the determination in this section, then stop your deliberations, cross out Sections II, III, IV, V and VI of this form, and proceed to Section VII. Each juror should then carefully read the statement in Section VII, and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you answered "YES" with respect to the determination in this Section I, proceed to Section II which follows.]

Death Penalty - Special Verdict Form

[I] [II.] REQUISITE MENTAL STATE

Instructions: [For each of the following,] answer "YES" or "NO."

[1(A) Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) intentionally killed (name of victim).][1]

YES _____

NO _____

_____

Foreperson

[1(B) Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) intentionally inflicted serious bodily injury which resulted in the death of (name of victim).]

YES _____

NO _____

_____

Foreperson

[1(C) Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) intentionally participated in an act, contemplating that the life of a person would be taken and/or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim (name of victim) died as a direct result of the act.]

YES _____

NO _____

_____

Foreperson

[1(D) Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) intentionally and specifically engaged in an act of violence,

knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim (name of victim) died as a direct result of the act.]

YES _____

NO _____

_____

Foreperson

Instructions: If you answered "NO" with respect to [all of] the determination[s] in this section, then stop your deliberations, cross out Sections [II], III, IV, [and] V [and VI] of this form, and proceed to Section [VI] [VII]. Each juror should carefully read the statement in Section [VI] [VII], and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you answered "YES" with respect to [one or more of] the determination[s] in this Section [I] [II], proceed to Section [II] [III] which follows.

[II] [III]. STATUTORY AGGRAVATING FACTORS

Instructions: [For each of the following,] [A]nswer "YES" or "NO." [List all aggravating factors supported by the evidence, using the language contained in 18 U.S.C. § 3592(c)(1)-(16); the following are examples]:

1. Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) [procured the commission of the offense by payment [promise of payment] of anything of pecuniary value], as set out in Instruction No. ___?

YES _____

NO _____

_____

Foreperson

2. Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that the defendant committed the offense of (name of offense) after substantial planning and premeditation [to cause the death of a person] [commit an act of terrorism], as set out in Instruction No. __?

YES _____

NO _____

_____

Foreperson

Instructions: If you answered "NO" with respect to [all of] the Statutory Aggravating Factor[s] in this Section [II] [III], then stop your deliberations, cross out Sections [III], IV, [and] V [and VI] of this form, and proceed to Section [VI] [VII] of this form. Each juror should then carefully read the statement in Section [VI] [VII], and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you found [the requisite age in Section I], the requisite mental state in Section [I] [II] and answered "Yes" with respect to [one or more of] [the] aggravating factor[s] in this Section [II] [III], proceed to Section [III] [IV] which follows.

[III] [IV]. NON-STATUTORY AGGRAVATING FACTORS

Instructions: [For each of the following,] [A]nswer "YES" or "NO." [List all nonstatutory aggravating factors supported by the evidence; the following is an example:

1. Do you, the jury, unanimously find that the government has established beyond a reasonable doubt that (the defendant) caused [DESCRIBE THE IMPACT OF THE KILLING ON THE VICTIM'S FAMILY], and that this factor tends to support imposition of the death penalty?][2]

YES _____

NO _____

_____

Foreperson

Death Penalty - Special Verdict Form

Instructions: Regardless of whether you answered "YES" or "NO" with respect to the Non-Statutory Aggravating Factor[s] in this Section [III] [IV], proceed to Section [IV] [V], which follows.

[IV] [V]. MITIGATING FACTORS

Instructions: For each of the following mitigating factors, [you have the option to] indicate, in the space provided, the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence. [If you choose not to make these written findings, cross out each page of Section V with a large "X" and then continue your deliberations in accordance with the instructions of the court.]

A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established in considering whether or not a sentence of death shall be imposed, regardless of the number of other jurors who agree that the factor has been established. Further, any juror may also weigh a mitigating factor found by another juror, even if he or she did not also find that factor to be mitigating:

[List only those mitigating factors for which evidence has been offered, using the language contained in 18 U.S.C. § 3592(a)(1)-(7); the following are examples]

1. (The defendant)'s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

Number of jurors who so find _____.

2. (The defendant) was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

Number of jurors who so find _____.

3. (The defendant) is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

Number of jurors who so find _____.

[Submit section 3592(a)(8) factors in accordance with the following example:

4. Defendant demonstrated severe learning problems in school, which led to academic failure, increased frustration, and eventual dropout, and those problems tend to indicate that defendant should not be sentenced to death.[3]

Number of jurors who so find _____.]

[List additional section 3592(a)(8) factor(s) in [the defendant]'s background or character, the circumstances of the crime(s), or other relevant fact or circumstance as mitigation:

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.]

The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors. If none, write "NONE" and line out the extra spaces with a large "X." If more space is needed, write "CONTINUED" and use the reverse side of this page.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

Death Penalty - Special Verdict Form

Instructions: [Regardless of whether you chose to make written findings for the Mitigating Factors in Section [IV] [V] above,] [P][p]roceed to Section [V] [VI] and Section [VI] [VII] which follow.

[V] [VI]. DETERMINATION

Based upon consideration of whether the aggravating factor[s] found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor[s] [is] [are] [itself] [themselves] sufficient to justify a sentence of death, and whether death is therefore the appropriate sentence in this case:

A. Death Sentence

We determine, by unanimous vote, that a sentence of death shall be imposed.

YES _____

NO _____

If you answer "YES," the foreperson must sign here, and you must then proceed to Section [VI] [VII]. If you answer "NO," the foreperson must sign, and you must then proceed to Section [V] [VI](B):

_____

FOREPERSON

Date: _____ __, ____

B. Sentence of Life in Prison Without Possibility of Release

We determine, by unanimous vote, that a sentence of life imprisonment without possibility of release shall be imposed.

YES _____

Death Penalty - Special Verdict Form

NO _____

If you answer "YES," the foreperson must sign here, and then you must proceed to Section [VI] [VII].

[If you answer "NO," the foreperson must sign, and you must proceed to Section [V] [VI](C)] :

_____

FOREPERSON

Date: _____ __, ____

C. Lesser Sentence.

We recommend, by unanimous vote, that a sentence lesser than death or life imprisonment without possibility of release shall be imposed.

YES _____

NO _____

If you answer "YES," the foreperson must sign here, and then you must proceed to Section [VI] [VII]:

_____

FOREPERSON

Date: _____ __, ____]

Death Penalty - Special Verdict Form

[VI] [VII]. CERTIFICATION

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or [the] [any] victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victim(s).

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

FOREPERSON

Date: _____ __, _____

Notes on Use

1. The Committee again suggests that, to avoid any concern over "stacking the deck" in favor of the death penalty, the court instruct only on those mental states clearly supported by the evidence. *See* Note on Use 2, Instruction 12.06, *infra*.

2. Each nonstatutory aggravating factor should include language that the factor tends to support imposition of the death penalty.

3. Each section 3592(a)(8) mitigating factor should include language that the factor is mitigating as defined in Instruction 12.01, *infra*.